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Looi Li Fong v Sew Hup Hoe and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(NCvC)(A)-1522–08 OF 2021 AND P-02(IM)(NCvC)-1523–08 OF 2021
VAZEER ALAM, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
13 SEPTEMBER 2023

C

Civil Procedure — Striking out — Application for — High Court dismissed appellant's application to strike out respondent's originating summons — Whether originating summons was academic, frivolous, vexatious and/or constituted abuse of court process

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Land Law — Indefeasibility of title and interest — Transfer of property — Originating summons ('OS') brought by respondent against appellant — Appellant and respondent were land's co-proprietors with each of them holding undivided share of land — Transfer of respondent's undivided share of land to appellant was registered by land administrator — Whether High Court functus officio in deciding OS — Whether parties' stay agreement was valid — Whether s 340(2)(c) of National Land Code was rightly applied by High Court — Whether order of sale enforceable against third parties

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These two appeals concerned a piece of land ('the land'). The appellant and respondent were the land's co-proprietors with each of them holding undivided share of the land. The appellant filed an originating summons at the High Court ('the first court') against the respondent and obtained an order ('the first order'). The respondent appealed to the Court of Appeal against the first order ('the respondent's appeal'). Pending the disposal of the respondent's appeal, there was an exchange of letters between the respondent and appellant where there was an agreement between the respondent and appellant for a stay of execution of the first order pending the disposal of the respondent's appeal ('the stay agreement'). The Court of Appeal dismissed the respondent's appeal ('the Court of Appeal's decision'). Thereafter, both the appellant and respondent received a joint offer from two third parties ('the third parties') to purchase the land ('the third parties' offer'). The respondent informed the appellant that the respondent accepted the third parties' offer. In response to the respondent, the appellant informed the respondent, among others, that: (a) in view of the Court of Appeal's decision, the appellant would execute the first order; and (b) if the respondent did not comply with the first order, the appellant would institute contempt of court proceedings against the respondent. The appellant

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served the respondent the documents for the sale and transfer of the respondent's 14 undivided share of the land to the appellant at a price of RM700,000 ('the transfer documents'). The respondent refused to acknowledge receipt of the transfer documents. By way of a letter to the first court's deputy registrar, the respondent had informed the first court of the following matters, among others: (i) there was a dispute between the appellant and respondent as to whether para 2 or para 3 of the first order was enforceable; and (ii) the respondent took the position that the appellant's right to enforce para 2 of the first order had lapsed and as there was now a purchaser who had offered a higher price to purchase the land, para 3 of the first order should be given effect. The respondent then filed an application pursuant to O 45 r 6 of the Rules of Court 2012 ('the ROC') for the court to fix a time period of 14 days for compliance with para 3 of the first order. The respondent did a land search and discovered that the transfer of the respondent's undivided share of the land to the appellant was registered by the land administrator ('the registered transfer'). The respondent filed this originating summons ('OS') in another court ('the second court') and prayed for the following relief, among others: (A) a declaration that: (1) the registration of the registered transfer was null and void; and (2) the appellant had unlawfully obtained the registered transfer and consequently, the appellant had not acquired an indefeasible registered transfer; and (B) an order that: (1) the land administrator shall cancel the registration of the registered transfer; and (2) the land be sold to the third parties. The appellant filed an application in the second court to strike out the OS ('striking out application'). The learned judicial commissioner ('JC') in the second court dismissed the striking out application and allowed the OS. The learned JC ordered the sale of the land to the third parties pursuant to O 31 r 1 of the ROC ('order of sale'). Hence, these appeals by the appellant against the second court's decisions ('striking out appeal' and 'appeal of the OS').

Held:

(1) The respondent was entitled to file the second action and dispute the validity of the appellant's execution of paras 2, 4 and 5 of the first order. The questions raised in the OS were not academic as no court, including the second court, had previously decided the issues. The issues required serious argument and mature consideration. Therefore, the OS was neither frivolous nor vexatious; and did not constitute an abuse of court process. The striking out appeal was dismissed with costs of RM5,000 (see para 29).

(2) The OS did not seek to 're-open, alter, amend and supplement' the first order. On the contrary, the OS averred that the appellant had breached para 2 of the first order by effecting the registered transfer. The second court could not be functus officio in deciding whether para 2 of the first order had been complied with by the appellant or otherwise (see para 31).

(3) Paragraph 2 of the first order required the respondent to sell the respondent's 14 undivided share of the land to the appellant within the 14 days period ('the first option'). If the first option was not exercised by the appellant within a reasonable time period after the Court of Appeal's decision, according to para 3 of the first order, the land may be sold to a third party ('the second option'). Paragraph 1 of the first order terminated the co-proprietorship of the land. Sequentially, after the termination of the co-proprietorship of the land, para 2 of the first order then conferred the first option on the appellant to buy the respondent's 14 undivided share of the land. Paragraph 3 of the first order was deliberately placed after para 2 of the first order, namely, para 3 could only be invoked if para 2 was not triggered. In other words, para 3 could not apply if para 2 was exercised by the appellant. Therefore, the learned JC had misconstrued paras 2 and 3 of the first order (see paras 33–34).

(4) The execution of a judgment/order may be stayed by agreement of parties to the judgment/order ('the agreement of the execution') as it was supported by freedom of parties to contract as they wish ('doctrine of freedom of contract') and its validity was supported by public policy considerations. Therefore, the stay agreement was valid and bound both the appellant and respondent (see paras 35–36).

(5) The effect of the stay agreement was to stay the appellant's enforcement of the first option in para 2 of the first order. The respondent's letter did not apply for the appellant's consent to stay the execution of para 3 of the first order only. It was therefore disingenuous of the respondent to allege that the stay agreement did not stay the enforcement of the first option by the appellant (see para 37).

(6) There was nothing in the ROC, including O 45 r 6(1) of the RC, which required the stay agreement to be made before the expiry of a time period which was stipulated in the judgment/order for the execution of the judgment/order ('the time period'). Further, in accordance with the doctrine of freedom of contract, parties to a judgment/order had the freedom to conclude the agreement of the execution. Public policy considerations also supported that the agreement of the execution could be concluded after the lapse of the time period. The stay agreement was valid notwithstanding the fact that the stay agreement was concluded after the expiry of the 14 days period. Accordingly, the learned JC committed a clear error in law when His Lordship failed to give effect to the stay agreement (see paras 39–40).

(7) The learned JC made a far-reaching decision, namely, the appellant's right to exercise the first option in para 2 of the first order 'expired' after the lapse of 14 days period and could not thereafter be invoked by the appellant. The first option was preserved by the stay agreement. The learned JC had committed an error of law by deciding that the first

option was no longer enforceable by the appellant without considering the effect of the stay agreement (see para 43).

(8) There should be a reasonable time period for the appellant to exercise the first option. The appellant's exercise of the first option was within a reasonable time period after the Court of Appeal's decision. The learned JC had committed an error of law by not deciding that by virtue of the stay agreement, the appellant had reasonable time to exercise the first option (see paras 45–46).

(9) By reason of the stay agreement, the respondent was estopped from exploiting unlawfully the lapse of the 14 days period (see para 47).

(10) Section 340(2)(c) of the National Land Code ('the NLC') only applied to render defeasible titles and interest in land which had been registered 'in the purported exercise of any power or authority conferred by any written law'. The learned JC had erroneously applied s 340(2)(c) of the NLC to set aside the registered transfer. This was because s 340(2)(c) of the NLC could only be applied to set aside titles and interest in land which had been registered in the purported exercise of any power or authority conferred by 'written law' as defined in s 3 of the Interpretation Acts 1948 and 1967. In this case, the registered transfer was affected pursuant to para 2 of the first order and was not done under any written law; and the registered transfer could only be set aside by the court pursuant to s 417(1) of the NLC (see paras 49–50).

(11) The order of sale could not bind the third parties because (a) the third parties were not cited by the respondent as co-defendants in the OS; and (b) the third parties were not heard by the second court before the making of the order of sale. The learned JC had erroneously made the order of sale. Therefore, the appeal of the OS was allowed (see paras 52–53).

[Bahasa Malaysia summary

Kedua-dua rayuan ini melibatkan sebidang tanah ('tanah'). Perayu dan responden adalah pemilik bersama tanah dengan masing-masing memegang bahagian tanah tidak dibahagikan. Perayu memfailkan saman pemula di Mahkamah Tinggi ('mahkamah pertama') terhadap responden dan memperoleh perintah ('perintah pertama'). Responden merayu kepada Mahkamah Rayuan terhadap perintah pertama ('rayuan responden'). Sementara menunggu pelupusan rayuan responden, berlaku pertukaran surat antara responden dan perayu di mana terdapat persetujuan antara responden dan perayu untuk penangguhan pelaksanaan perintah pertama sementara menunggu pelupusan rayuan responden ('perjanjian penangguhan'). Mahkamah Rayuan menolak rayuan responden ('keputusan Mahkamah Rayuan'). Selepas itu, kedua-dua perayu dan responden menerima tawaran bersama daripada dua pihak ketiga ('pihak ketiga') untuk membeli tanah tersebut ('tawaran pihak ketiga'). Responden memaklumkan perayu bahawa

responden menerima tawaran pihak ketiga. Sebagai maklum balas kepada responden, perayu memaklumkan responden, antara lain, bahawa: (a) memandangkan keputusan Mahkamah Rayuan, perayu akan melaksanakan perintah pertama; dan (b) jika responden tidak mematuhi perintah pertama, perayu akan memulakan prosiding menghina mahkamah terhadap responden. Perayu menyerahkan kepada responden dokumen untuk penjualan dan pemindahan 14 bahagian tanah tidak dibahagikan responden kepada perayu pada harga RM700,000 ('dokumen pemindahan'). Responden enggan mengakui penerimaan dokumen pemindahan. Melalui surat kepada timbalan pendaftar mahkamah pertama, responden telah memaklumkan kepada mahkamah pertama perkara-perkara berikut, antara lain: (i) terdapat pertikaian antara perayu dan responden sama ada perenggan 2 atau perenggan 3 perintah pertama boleh dikuatkuasakan; dan (ii) responden mengambil pendirian bahawa hak perayu untuk menguatkuasakan perenggan 2 perintah pertama telah luput dan memandangkan kini terdapat pembeli yang telah menawarkan harga yang lebih tinggi untuk membeli tanah tersebut, perenggan 3 perintah pertama perlu dilaksanakan. Responden kemudiannya memfailkan permohonan menurut A 45 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk mahkamah menetapkan tempoh masa 14 hari bagi pematuhan perenggan 3 perintah pertama. Responden telah membuat carian tanah dan mendapati bahawa pemindahan bahagian tanah tidak dibahagikan responden kepada perayu telah didaftarkan oleh pentadbir tanah ('pindah milik berdaftar'). Responden memfailkan saman pemula ('OS') ini di mahkamah lain ('mahkamah kedua') dan memohon untuk relif berikut, antara lain: (A) satu perisytiharan bahawa: (1) pendaftaran pindah milik berdaftar itu adalah terbatal dan tidak sah; dan (2) perayu telah secara tidak sah memperoleh pindah milik berdaftar itu dan akibatnya, perayu tidak memperoleh pindah milik berdaftar yang tidak boleh disangkal; dan (B) satu perintah bahawa: (1) pentadbir tanah hendaklah membatalkan pendaftaran pindah milik berdaftar itu; dan (2) tanah itu dijual kepada pihak ketiga. Perayu memfailkan permohonan di mahkamah kedua untuk membatalkan OS ('permohonan pembatalan'). Pesuruhjaya kehakiman ('PK') di mahkamah kedua menolak permohonan pembatalan dan membenarkan OS. PK yang bijaksana mengarahkan penjualan tanah itu kepada pihak ketiga menurut A 31 k 1 KKM ('perintah penjualan'). Oleh itu, rayuan ini oleh perayu terhadap keputusan mahkamah kedua ('rayuan pembatalan' dan 'rayuan OS').

Diputuskan:

(1) Responden berhak memfailkan tindakan kedua dan mempertikaikan kesahihan pelaksanaan perayu bagi perenggan 2, 4 dan 5 perintah pertama. Soalan yang dibangkitkan dalam OS bukan akademik kerana tiada mahkamah, termasuk mahkamah kedua, sebelum ini memutuskan isu tersebut. Isu tersebut memerlukan hujahan yang serius dan pertimbangan lengkap. Oleh itu, OS itu tidak remeh dan tidak

menyusahkan; dan tidak membentuk penyalahgunaan proses mahkamah. Rayuan pembatalan telah ditolak dengan kos RM5,000 (lihat perenggan 29).

(2) OS tidak berusaha untuk 'membuka semula, mengubah, meminda dan menambah' perintah pertama. Sebaliknya, OS menegaskan bahawa perayu telah melanggar perenggan 2 perintah pertama dengan melaksanakan pindah milik berdaftar. Mahkamah kedua tidak functus officio dalam memutuskan sama ada perenggan 2 perintah pertama telah dipatuhi oleh perayu atau sebaliknya (lihat perenggan 31).

(3) Perenggan 2 perintah pertama menghendaki responden menjual 14 bahagian tanah tidak dibahagikan responden kepada perayu dalam tempoh 14 hari ('pilihan pertama'). Jika pilihan pertama tidak dilaksanakan oleh perayu dalam tempoh masa yang munasabah selepas keputusan Mahkamah Rayuan, mengikut perenggan 3 perintah pertama, tanah itu boleh dijual kepada pihak ketiga ('pilihan kedua'). Perenggan 1 perintah pertama menamatkan hak milik bersama tanah itu. Secara berurutan, selepas penamatan hak milik bersama tanah itu, perenggan 2 perintah pertama kemudiannya memberikan pilihan pertama kepada perayu untuk membeli 14 bahagian tanah yang tidak dibahagikan responden. Perenggan 3 perintah pertama sengaja diletakkan selepas perenggan 2 perintah pertama, iaitu perenggan 3 hanya boleh digunakan jika perenggan 2 tidak dicetuskan. Dalam erti kata lain, perenggan 3 tidak boleh digunakan jika perenggan 2 telah dilaksanakan oleh perayu. Oleh itu, PK yang bijaksana telah salah tafsir perenggan 2 dan 3 perintah pertama (lihat perenggan 33–34).

(4) Perlaksanaan penghakiman/perintah boleh ditangguhkan melalui persetujuan pihak-pihak kepada penghakiman/perintah ('perjanjian pelaksanaan') kerana ia disokong oleh kebebasan pihak-pihak untuk berkontrak mengikut kehendak mereka ('doktrin kebebasan kontrak') dan kesahihannya disokong oleh pertimbangan dasar awam. Oleh itu, perjanjian penangguhan adalah sah dan mengikat kedua-dua perayu dan responden (lihat perenggan 35–36).

(5) Kesan perjanjian penangguhan itu adalah untuk menangguhkan penguatkuasaan pilihan pertama perayu dalam perenggan 2 perintah pertama. Surat responden tidak memohon kebenaran perayu untuk menangguhkan pelaksanaan perenggan 3 perintah pertama sahaja. Oleh itu adalah salah bagi responden untuk mendakwa bahawa perjanjian penangguhan tidak menangguhkan penguatkuasaan pilihan pertama oleh perayu (lihat perenggan 37).

(6) Tiada apa-apa dalam KKM, termasuk A 45 k 6(1) KKM, yang memerlukan perjanjian penangguhan dibuat sebelum tamat tempoh masa yang ditetapkan dalam penghakiman/perintah untuk pelaksanaan

penghakiman/perintah ('tempoh masa'). Selanjutnya, selaras dengan doktrin kebebasan berkontrak, pihak-pihak kepada penghakiman/perintah mempunyai kebebasan untuk membuat perjanjian pelaksanaan. Pertimbangan dasar awam juga menyokong bahawa perjanjian pelaksanaan boleh dibuat selepas tamat tempoh masa. Perjanjian penangguhan adalah sah walaupun perjanjian penangguhan telah dibuat selepas tamat tempoh 14 hari. Sehubungan itu, PK yang bijaksana telah melakukan kesilapan yang jelas dalam undang-undang apabila Yang Arif gagal menguatkuasakan perjanjian penangguhan (lihat perenggan 39–40).

(7) PK yang bijaksana membuat keputusan yang meluas, iaitu, hak perayu untuk melaksanakan pilihan pertama dalam perenggan 2 perintah pertama 'tamat' selepas tempoh 14 hari berlalu dan tidak boleh digunakan oleh perayu selepas itu. Pilihan pertama telah dipelihara oleh perjanjian penangguhan. PK yang bijaksana telah melakukan kesilapan undang-undang dengan memutuskan bahawa pilihan pertama tidak lagi boleh dikuatkuasakan oleh perayu tanpa mengambil kira kesan perjanjian penangguhan (lihat perenggan 43).

(8) Perlu ada tempoh masa yang munasabah untuk perayu melaksanakan pilihan pertama. Perlaksanaan pilihan pertama oleh perayu adalah dalam tempoh masa yang munasabah selepas keputusan Mahkamah Rayuan. PK yang bijaksana telah melakukan kesilapan undang-undang dengan tidak memutuskan bahawa berdasarkan perjanjian penangguhan, perayu mempunyai masa yang munasabah untuk melaksanakan pilihan pertama (lihat perenggan 45–46).

(9) Atas sebab perjanjian penangguhan, responden telah dihalang daripada mengeksploitasi secara salah berkenaan tamat tempoh 14 hari (lihat perenggan 47).

(10) Seksyen 340(2)(c) Kanun Tanah Negara ('KTN') hanya terpakai untuk memberikan hak milik dan kepentingan yang boleh dibatalkan dalam tanah yang telah didaftarkan 'dalam pergunaan berupa apa-apa kuasa atau autoriti yang diberi oleh mana-mana undang-undang bertulis'. PK yang bijaksana telah terkhilaf menggunakan s 340(2)(c) KTN untuk mengetepikan pindah milik berdaftar. Ini adalah kerana s 340(2)(c) KTN hanya boleh digunakan untuk mengetepikan hakmilik dan kepentingan dalam tanah yang telah didaftarkan dalam pergunaan berupa apa-apa kuasa atau autoriti yang diberi oleh mana-mana 'undang-undang bertulis' seperti yang ditakrifkan dalam s 3 Akta Tafsiran 1948 dan 1967. Dalam kes ini, pindah milik berdaftar telah terjejas menurut perenggan 2 perintah pertama dan tidak dilakukan di bawah mana-mana undang-undang bertulis; dan pindah milik berdaftar hanya boleh diketepikan oleh mahkamah menurut s 417(1) KTN (lihat perenggan 49–50).

(11) Perintah jualan tidak boleh mengikat pihak ketiga kerana (a) pihak ketiga tidak disebut oleh responden sebagai defendan bersama dalam OS; dan (b) pihak ketiga tidak didengari oleh mahkamah kedua sebelum membuat perintah jualan. PK yang bijaksana telah terkhilaf membuat perintah jualan. Oleh itu, rayuan OS telah dibenarkan (lihat perenggan 52–53).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (folld)
Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462 (refd)
Stone World Sdn Bhd v Engareh (M) Sdn Bhd [2020] 12 MLJ 237, FC (refd)
Toh Seow Ngan & Ors v Toh Seak Keng & Ors [1990] 2 MLJ 303, SC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 ss 2(1)(b), 3, Part I
National Land Code ss 2(1)(b), 3, 5, 145(1), 340(1), (2)(c), 417(1)
Revision of Laws Act 1968
Rules of Court 2012 O 3 r 5, 5(1), (2), O 31 r 1, O 45 r 6, 6(1)

Appeal from: Originating Summons No PA-24NCvC-810–11 of 2020 (High Court, Penang)

Abdul Fareed bin Abdul Gafoor (with Sunny Khoo) (Sunny Khoo & Co) for the appellant.
Tan Beng Hong (with Lim Eu Shen) (Lim, Ooi & Partners) for the respondent.

Wong Kian Kheong JCA:

A. BACKGROUND

[1] The above two appeals ('two appeals') concern a piece of land held under Title No GM 1306 (formerly GM 311), Lot 13379 (formerly Lot 1457), Mukim 15, Daerah Seberang Perai Selatan, Penang with a postal address of No 1629, Jalan Besar, 14100 Simpang Ampat, Penang ('land').

[2] The appellant and respondent in these two appeals (henceforth referred to in this judgment as the 'appellant' and 'respondent') were the land's co-proprietors with each of them holding 1/2 undivided share of the land.

B. FIRST SUIT

[3] The appellant filed Penang High Court Originating Summons No PA-24NCvC-598–07 of 2018 against the respondent and obtained the following order on 16 April 2019 (first order) from Azmi Abdullah JC (as he then was) (first court):

1. *Bahawa milikan bersama ('co-proprietorship') dalam hartanah yang dikenali sebagai [details of the Land] dengan sebuah premis [details of the premises on the Land] ('Hartanah tersebut') yang didirikan di situ dipisahkan ('co-proprietorship be terminated') di bawah Seksyen 145(1) Kanun Tanah Negara, 1965*.

2. *[Respondent] sebagai pemilik 1/2 bahagian yang tidak terbahagi hartanah tersebut yang dikenali sebagai [details of the land] dengan sebuah premis yang dikenali sebagai [details of the premises on the land] menjualkan 1/2 bahagian yang tidak terbahagi Hartanah tersebut kepada [appellant] dengan harga jualan RM700,000.00 sahaja ('harga jualan tersebut') berdasarkan harga rizab RM1,400,000.00 dalam tempoh empat belas (14) hari daripada tarikh perintah ini*. Harga jualan tersebut adalah tertakluk kepada penolakan baki pinjaman daripada Public Bank Berhad berdasarkan penyata akaun terkini, yang akan dibayar secara sama rata antara [Respondent] dan [Appellant] serta apa-apa kos yang perlu dibayar bagi perjanjian jual beli itu.

3. *Secara alternatifnya, hartanah tersebut yang dikenali sebagai [details of the Land] dengan sebuah premis yang dikenali sebagai [details of the premises on the Land] dijualkan kepada suatu pihak ketiga melalui suatu perjanjian jual beli antara [Appellant] dan [Respondent] sebagai pemilik 1/2 bahagian masing-masing yang tidak berbahagi Hartanah tersebut dengan harga rizab tidak kurang daripada RM1,400,000.00*. Harga jualan tersebut adalah tertakluk kepada penolakan penebusan baki pinjaman ('redemption sum') daripada Public Bank Berhad, yang dibayar secara sama rata antara [Respondent] dan [Appellant] serta apa-apa kos yang perlu dibayar bagi perjanjian jual beli itu.

4. *[Respondent] dikehendaki menandatangani kesemua ataupun apa-apa perjanjian dan/atau borang pindahmilik dan/ataupun borang ataupun dokumen yang berkaitan bagi penjualan Hartanah tersebut untuk memberi kesan kepada penjualan Hartanah tersebut kepada [Appellant] ataupun kepada pihak ketiga (yang mana berkenaan) dan [Respondent] dikehendaki memberikan milikan kosong Hartanah tersebut kepada [Appellant] ataupun kepada pihak ketiga (yang mana berkenaan) yang membeli Hartanah tersebut dari masa tujuh (7) hari dari tarikh 'completion' perjanjian jual beli Hartanah tersebut*.

5. *Bahawa sekiranya [Respondent] gagal menandatangani kesemua ataupun apa-apa perjanjian dan/atau borang ataupun dokumen berkenaan pindahmilik Hartanah tersebut untuk memberi kesan kepada penjualan Hartanah tersebut kepada pihak yang membeli Hartanah tersebut maka*

Penolong Kanan Pendaftar Mahkamah ini diberi kuasa menandatangani kesemua ataupun apa-apa perjanjian dan/atau borang ataupun dokumen berkenaan pindahmilik Hartanah tersebut untuk memberi kesan kepada penjualan Hartanah tersebut kepada mana-mana suatu pihak pembeli Hartanah tersebut.

6. [Respondent] dikehendaki menyerahkan milikan kosong bagi 1/2 bahagian tidak berbahagi Hartanah tersebut dalam temph tujuh (7) hari selepas diberitahu ('notification') oleh Tetuan Sunny Khoo & Company tentang bayaran penuh harga belian Hartanah tersebut telah dibayar oleh [Appellant] ataupun mana-mana suatu pihak pembeli Hartanah tersebut.

7. Perbelanjaan berkenaan dengan keseluruhan proses ini ditolak daripada harga jualan dan bakinya dibahagikan antara [Appellant] dan [Respondent] dengan sama rata setelah ditolak segala bayaran perbelanjaan guaman yang dibuat oleh [Appellant] berkenaan perjanjian jual beli Hartanah tersebut, bayaran redemption ('redemption') pinjaman bank dengan Public Bank Berhad, bayaran untuk Cukai Tanah dan Cukai Taksiran kerajaan tempatan ('local government Assessment') ataupun apa-apa jenis bayaran yang dikenakan oleh pihak berkuasa yang dikira sehingga tarikh pindahmilik Hartanah tersebut atas nama pemilik baru tertakluk kepada bukti bayaran sebenarnya dengan mengemukakan resit-resit bayaran tersebut. (Emphasis added.)

[4] The respondent appealed to the Court of Appeal against the first order ('respondent's appeal (first order)').

[5] Pending the disposal of the respondent's appeal (first order), the respondent's solicitors sent a letter dated 15 May 2019 to the appellant's solicitors ('respondent's letter (15 May 2019)') which stated as follows:

Can we agree to a stay of all further proceedings until the disposal of [respondent's appeal (first order)]?

We will arrange for payment of your cost [sic] and allocator [sic] fee as soon as we obtain your client's response. (Emphasis added.)

[6] The appellant's solicitors replied positively to the respondent's letter (15 May 2019) in a letter dated 16 May 2019 ('appellant's letter (16 May 2019)'). According to the appellant's letter (16 May 2019):

With reference to [respondent's letter (15 May 2019)] with your request for stay of [first order] until disposal of [respondent's appeal (first order)].

Kindly be informed that we would not execute the [first order] pending the [respondent's appeal (first order)]. However your client is required to pay up the cost [sic] of RM3,000 and allocator [sic] fee of RM120 on or before 21 May 2019 by pay [sic] into our client's account Ambank ... (Emphasis added.)

[7] The respondent paid to the appellant the costs and allocatur fee for the first order. Hence, through an exchange of letters between solicitors for the respondent and appellant, there was an agreement between the respondent and appellant for a stay of execution of the first order pending the disposal of the respondent's appeal (first order) ('parties agreement (stay of execution of first order)').

[8] The Court of Appeal dismissed the respondent's appeal (first order) with costs on 30 June 2020 ('Court of Appeal's decision (first order)'). The respondent did not apply to the Federal Court for leave to appeal against the Court of Appeal's decision (first order). Accordingly, the first order is final.

[9] On 18 July 2020, both the solicitors for the appellant and respondent received a joint offer from Messrs Veon Szu & Kok Thye ('Messrs VSKT'), solicitors for two third parties, Mr Poh Chin Soon and Mr Poh Chin Lee (collectively referred to in this judgment as the 'third parties'), to purchase the land at a price of RM2m ('third parties' offer (land)').

[10] The respondent's solicitors sent a letter dated 21 July 2020 to the appellant's solicitors ('respondent's letter (21 July 2020)') which stated that, among others, the respondent accepted the third parties' offer (land).

[11] In response to the respondent's letter (21 July 2020), the appellant's solicitors sent a letter dated 22 July 2020 to the respondent's solicitors ('appellant's letter (22 July 2020)'). According to the appellant's letter (22 July 2020), among others:

(1) in view of the Court of Appeal's decision (first order), the appellant would execute the first order;

(2) Messrs VSKT were not privy to the first order; and

(3) if the respondent did not comply with the first order, the appellant would institute contempt of court proceedings against the respondent.

[12] The appellant's conveyancing solicitors, Messrs BH Tan & Associates ('Messrs BHTA'), served a letter dated 23 July 2020 on the respondent personally ('Messrs BHTA's letter (23 July 2020)'). Attached to Messrs BHTA's Letter (23 July 2020) were the following documents for the sale and transfer of the respondent's 1/2 undivided share of the land to the appellant at a price of RM700,000 ('transfer documents (respondent's share)'):

(1) sale and purchase agreement;

(2) memorandum of transfer;

(3) letter of authorisation to redeem the land from the chargee of the land, Public Bank Bhd (chargee); and

(4) letter of undertaking in favour of the chargee.

Messrs BHTA's letter (23 July 2020) stated that, among others:

(a) as the respondent's appeal (first order) had been dismissed by the Court of Appeal and the respondent had not filed an application to the Federal Court for leave to appeal against the Court of Appeal's decision (first order), the respondent was required to execute the transfer documents (respondent's share) within three days from the date of Messrs BHTA's letter (23 July 2020); and

(b) if the respondent failed to execute the transfer documents (respondent's share) as requested, the appellant would approach the first court's senior assistant registrar ('SAR') to sign the transfer documents (respondent's share) without any further reference to the respondent.

[13] The respondent refused to acknowledge receipt of the transfer documents (respondent's share).

[14] The respondent's solicitors wrote a letter dated 23 July 2020 to Messrs BHTA ('respondent's letter (23 July 2020)') which stated as follows, among others:

(1) Messrs BHTA were requested not to 'interfere' with the respondent; and

(2) if there was any dispute between the parties regarding the sale of the land, 'let the solicitors on record deal with the situation'.

The respondent's letter (23 July 2020) was copied to the appellant's solicitors.

[15] By way of a letter dated 25 July 2020 to the first court's deputy registrar ('DR') (copied to the appellant's solicitors), the respondent's solicitors had informed the first court of the following matters, among others:

(1) there was a dispute between the appellant and respondent as to whether para 2 or para 3 of the first order (hereinafter referred to in this judgment as 'para 2' and 'para 3') was enforceable;

(2) the respondent had been warned by Messrs BHTA that if the respondent did not sign the transfer documents (respondent's share), the first court's DR or SAR ('DR/SAR') would be approached to sign the transfer documents (respondent's share);

(3) the respondent took the position that the appellant's right to enforce para 2 had lapsed and as there was now a purchaser who had offered a higher price to purchase the land, para 3 should be given effect;

(4) the respondent was in the process of filing an application pursuant to O 45 r 6 of the Rules of Court 2012 ('the ROC') for the court to fix a time period for compliance with para 3; and

(5) if the first court's DR/SAR was approached to sign the transfer documents (respondent's share), the respondent's solicitors should not be excluded from making any representation to the first court.

[16] On 28 July 2020, the respondent filed an application in the first court for the first court to fix a time period of 14 days for compliance with para 3 ('encl 39 (first court)').

[17] With regard to encl 39 (first court):

(1) the appellant and respondent had completed their exchange of affidavits; and

(2) the appellant and respondent were in the midst of filing their written submission when the respondent did a land search on 15 October 2020 and discovered that the transfer of the respondent's 1/2 undivided share of the land to the appellant was registered by the land administrator ('LA') on 5 October 2020 ('registered transfer (respondent's share)').

[18] In view of the respondent's refusal to sign the transfer documents (respondent's share):

(1) the first court's SAR executed the transfer documents (respondent's share) on 17 September 2020;

(2) the land was redeemed by the respondent from the chargee for a sum of RM417,700 (redemption sum); and

(3) the registered transfer (respondent's share) was effected by the LA.

[19] Messrs BHTA sent a letter dated 19 October 2020 which informed the respondent as follows:

(1) the land had been redeemed from the chargee by way of the respondent's payment of the redemption sum to the chargee;

(2) the SAR had executed the transfer documents (respondent's share) and the registered transfer (respondent's share) had been completed for a consideration of RM700,000;

(3) the respondent was entitled to a sum of RM490,000 ('respondent's entitlement (sum)') as the balance of the purchase price for the respondent's 1/2 undivided share in the land, less payments of the respondent's share for the redemption sum, legal fees and disbursements; and

(4) the respondent's entitlement (sum) could be collected from Messrs BHTA upon the respondent's delivery of vacant possession of the land.

C. THIS ORIGINATING SUMMONS ('OS')

[20] The respondent filed this OS in another court (second court) and prayed for the following relief, among others:

(1) a declaration that:

(a) the registration of the registered transfer (respondent's share) was null and void; and

(b) the appellant had unlawfully obtained the registered transfer (respondent's share) and consequently, the appellant had not acquired an indefeasible registered transfer (respondent's share).

(2) an order that:

(a) the LA shall cancel the registration of the registered transfer (respondent's share); and

(b) the land be sold to the third parties at a price of RM2m.

[21] The appellant filed an application in the second court to strike out the OS ('encl 6 (second court)').

[22] The learned JC in the second court:

(1) dismissed encl 6 (second court) with costs of RM5,000 (subject to allocatur fee) ('second court's decision (encl 6)'); and

(2) allowed the OS with costs of RM8,000 (subject to allocatur fee) ('second court's decision (OS)').

[23] These two appeals were lodged by the appellant against the second court's decision (encl 6) and second court's decision (OS). This judgment shall refer to the second court's decision (encl 6) and second court's decision (OS) collectively as the 'second court's two decision'.

D. GROUNDS FOR SECOND COURT'S TWO DECISIONS

[24] The learned JC had delivered one 'grounds of judgment' for the second court's two decisions ('GOJ').

[25] According to the GOJ, in brief:

(1) it is not plain and obvious to strike out the OS. Hence, the second court's decision (encl 6); and

(2) the second court's decision (OS) was premised on the following grounds:

(a) the 14 days period stipulated in para 2 ('14 days period (para 2)') expired on 30 April 2019, before the parties' agreement (stay of execution of first order) (para 75 GOJ);

(b) as the appellant had not exercised the option in para 2 within the 14 days period (para 2), the appellant's rights under para 2:

(i) were 'non-existent';

(ii) 'expired'; and

(iii) had become 'redundant',

when the parties' agreement (stay of execution of first order) was made — please refer to paras 76 and 77 GOJ.

(c) the parties' agreement (stay of execution of first order) had not 'hindered' or 'delayed' the performance of para 2 because there were neither negotiations nor agreement to stay the execution of the first order during the 14 days period (para 2) (para 77 GOJ);

(d) the appellant and respondent did not agree to an extension of the 14 days period (para 2) — please see para 78 GOJ;

(e) the appellant did not apply under O 45 r 6(1) of the ROC for the court to extend the 14 days period (para 2) (paras 79 and 80 GOJ);

(f) the existence of an alternative to para 2 in para 3, indicated that the 14 days period (para 2) 'must be strictly adhered to'. If there was no strict compliance with the 14 days period (para 2) and if para 2 could be complied with at any time at the convenience of the appellant, the alternative para 3 would become redundant. As para 2 was not complied with by the appellant within the 14 days period (para 2), para 3 could be 'activated' by the appellant and respondent - please refer to paras 81 and 82 GOJ;

(g) based on the above interpretation of para 2:

(i) the appellant's purported compliance with para 2 was not valid as the same was not complied with on or before the expiry of the 14 days period (para 2) (para 83 GOJ);

(ii) the appellant had unlawfully acquired the registered transfer (respondent's share) within the meaning of s 340(2)(c) of the National land Code ('the NLC') — please see paras 84 and 85 GOJ; and

(iii) by virtue of s 417(1) of the NLC, the court can declare invalid the registered transfer (respondent's share) (paras 86 and 87 GOJ).

(h) the third parties' offer (land) was properly exercised in compliance with para 3. Since the appellant had failed to perform para 2 within the 14 days period (para 2) and there was no extension of the 14 days period (para 2), the appellant was bound by para 3. The learned JC ordered the sale of the land to the third parties at the price of RM2m pursuant to O 31 r 1 of the ROC ('second court's order (sale to third parties)') — please refer to paras 88 to 90 GOJ.

E. THE APPELLANT'S SUBMISSION

[26] In support of the two appeals, the appellant's learned counsel advanced the following contentions, among others:

(1) the respondent had not denied personal service of the transfer documents (respondent's share) by Messrs BHTA;

(2) para 4 of the first order (para 4) required the respondent to execute the transfer documents (respondent's share) and if the respondent failed to do so, para 5 of the first order (para 5) authorized the first court's SAR to sign the transfer documents (respondent's share). Paragraphs 2, 4 and 5 had been executed in this case. As such:

  (a) the OS was a 'non-starter';

  (b) the OS had become academic; and/or

  (c) there was no live issue to be decided by the second court in this OS.

(3) in view of the parties' agreement (stay of execution of first order):

  (a) time had become at large and the respondent could not therefore rely on the enforcement of the 14 days period (para 2); and

  (b) the respondent was estopped from insisting on the application of the 14 days period (para 2).

(4) as the appellant had executed paras 2, 4 and 5, the alternative para 3 did not arise;

(5) in view of the execution of paras 2, 4 and 5, the second court was *functus officio* and could not grant the orders sought in the OS; and

(6) the respondent's reliance on the 14 days period (para 2) and para 3 was contrived after the respondent's service of Messrs BHTA's letter (23 July 2020).

A F. THE RESPONDENT'S CONTENTIONS

[27] The respondent's learned counsel relied heavily on the GOJ to resist the two appeals. Additionally, according to the respondent's learned counsel, among others:

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(1) the appellant did not exercise para 2 on or before 30 April 2019 ('before the expiry of the 14 days period (para 2)');

(2) the parties' agreement (stay of execution of first order) did not apply to para 2 because the 14 days period (para 2) had already lapsed at the time C of the parties' agreement (stay of execution of first order). Consequently, the parties' agreement (stay of execution of first order) only applied to all paragraphs of the first order other than para 2; and

(3) even if the 14 days period (para 2) was to commence from the date of the D Court of Appeal's decision (first order), the appellant had failed to execute para 2 within this time period.

G. ISSUES

E **[28]** The following questions arise in these two appeals:

(1) with regard to the appeal against the second court's decision (encl 6) (striking out appeal), whether the OS:

(a) was academic;

F (b) was frivolous and/or vexatious; and/or

(c) constituted an abuse of court process.

(2) in respect of the appeal against the second court's decision (OS) ('appeal (OS)'):

G

(a) was the second court *functus officio* in deciding the OS?

(b) how should the court interpret paras 2 and 3?

(c) with regard to the 14 days period (para 2):

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(i) could the enforcement of the 14 days period (para 2) be stayed by the parties' agreement (stay of execution of first order)?

(ii) whether the parties' agreement (stay of execution of first order) should be made before the expiry of the 14 days period (para 2); I and

(iii) if the parties' agreement (stay of execution of first order) could not stay the enforcement of the 14 days period (para 2), whether the lapse of the 14 days period (para 2) would render para 2 unenforceable in law.

(d) if the parties' agreement (stay of execution of first order) could stay the enforcement of the 14 days period (para 2):

(i) upon the delivery of the Court of Appeal's decision (first order), whether there should be a reasonable time period for the appellant to enforce para 2; and

(ii) was the respondent estopped from exploiting unlawfully the lapse of the 14 days period (para 2)?

(e) assuming that the registered transfer (respondent's share) was acquired contrary to para 2, could the learned JC invoke s 340(2)(c) of the NLC (which only invalidates title and interest in land which have been acquired '*in the purported exercise of any power or authority conferred by any written law*')? and

(f) whether the learned JC could order the land to be sold to third parties when the third parties:

(i) had not been made parties in the OS by the respondent; and

(ii) had been afforded a right of hearing by the learned JC.

OUR DECISION

H. STRIKING OUT APPEAL

[29] We have no hesitation to dismiss the striking out appeal with costs of RM5,000 (subject to payment of allocatur fee) because:

(1) the respondent was entitled to file the second action and dispute the validity of the appellant's execution of paras 2, 4 and 5. The questions raised in the OS as outlined in the above sub-paras 28(2)(a) to (f) ('issues (OS)') were not academic as no court, including the second court, had previously decided the issues (OS);

(2) the issues (OS) require serious argument and mature consideration — please refer to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, at p 588; and

(3) in view of the issues (OS), the OS:

(a) was neither frivolous nor vexatious; and

(b) did not constitute an abuse of court process.

A I. WAS THE SECOND COURT FUNCTUS OFFICIO?

[30] The doctrine of *functus officio* has been explained by Nallini Pathmanathan FCJ in the Federal Court case of *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 12 MLJ 237, at [13], as follows:

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> [13] *It is settled law that once a court has pronounced a final order it does not possess the authority to re-open, alter, amend and supplement the final order and judgment relating to the dispute it has adjudicated upon. This rule, known as the doctrine of functus officio, stems from the principle of finality in litigation. There would be great uncertainty and chaos if courts were permitted to review and reconsider final orders and judgments*. (Emphasis added.)

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[31] The OS did not seek to 're-open, alter, amend and supplement' the first order. On the contrary, the OS averred that the appellant had breached para 2 by effecting the registered transfer (respondent's share). A party who is unsuccessful in a final judgment and/or order (judgment/order) has a right to dispute the validity of the execution of any judgment/order by the successful party. Accordingly, in our view, the second court could not be *functus officio* in deciding whether para 2 had been complied with by the appellant or otherwise.

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E J. CONSTRUCTION OF PARAS 2 AND 3

[32] In the interpretation of paras 2 and 3, we are guided by the following judgment of Chong Siew Fai CJ (Sabah and Sarawak) in the Federal Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353, at p 374:

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> *In Re Strand Music Hall Co Ltd (1865) 35 Beav 153, Sir John Romilly MR observed* (at p 158):
>
> > *The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.*
>
> *Though the above quoted passage related to a deed, the declared principle applies, in my view, equally to a court order*. (Emphasis added.)

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[33] We construe paras 2 and 3 as follows:

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(1) firstly, para 2 requires the respondent to sell the respondent's 1/2 undivided share of the land to the appellant within the 14 days period (para 2) ('first option'). In part K(5) below, we will explain that in view of the parties agreement (stay of execution of first order), the 14 days period (para 2) was replaced by a reasonable time period after the Court of Appeal's decision (first order) for the appellant to exercise the first option; and

(2) if the first option is not exercised by the appellant within a reasonable time period after the Court of Appeal's decision (first order), according to para 3, the land may be sold to a third party ('second option').

The above interpretation of paras 2 and 3 is supported by the following reasons:

(a) the first option is clear from the sequence of para 1 of the first order (para 1), paras 2 and 3 in that order. Paragraph 1 terminates the co-proprietorship of the land. Sequentially, after the termination of the co-proprietorship of the land, para 2 then confers the first option on the appellant to buy the respondent's 1/2 undivided share of the land;

(b) para 3 was deliberately placed in the first order after para 2, namely, para 3 can only be invoked if para 2 is not triggered. In other words, para 3 cannot apply if para 2 is exercised by the appellant;

(c) para 3 cannot be the first option because of the presence of the words 'Secara alternatifnya' in para 3; and

(d) if para 3 is the first option, this will render redundant:

(i) para 2; and

(ii) the words 'Secara alternatifnya' in para 3.

As decided in *Newacres*, the court should give effect to para 2 and the words 'Secara alternatifnya' in para 3.

[34] With respect to the learned JC in this case, as explained in the above para 33, the learned JC had misconstrued paras 2 and 3 (first legal error).

K. PARTIES AGREEMENT (STAY OF EXECUTION OF FIRST ORDER)

K(1) Whether parties agreement (stay of execution of first order) was valid

[35] We are of the view that the execution of a judgment/order may be stayed by agreement of parties to the judgment/order ('parties' agreement (execution of judgment/order)'). Our reasons are as follows:

(1) if a judgment/order is made in favour of a party ('X') against another party ('Y'), there is no provision in ROC which prohibits X and Y from making a parties' agreement (execution of judgment/order). In fact, parties' agreement (execution of judgment/order) is supported by freedom of parties to contract as they wish (doctrine of freedom of contract). The doctrine of freedom of contract has been explained by Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, at p 465, as follows:

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. (Emphasis added.)

(2) if X or Y renegades from the parties' agreement (execution of judgment/order), X or Y will be estopped from denying the effect of the parties' agreement (execution of judgment/order) — please refer to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 341; [1995] 4 CLJ 283 at p 294; and

(3) the validity of parties' agreement (execution of judgment/order) is supported by public policy considerations. If there is no parties' agreement (execution of judgment/order), Y has to file possibly two court applications to stay the execution of the judgment/order pending the disposal of Y's appeal against the judgment/order (two court applications (stay of execution)) as follows:

(a) Y has to apply to the court of first instance (which has delivered the judgment/order) for a stay of execution of the judgment/order; and

(b) if the court of first instance dismisses Y's application to stay the execution of the judgment/order, then Y has to apply to the appellate court for a stay of execution of the judgment/order. When a parties' agreement (execution of judgment/order) is concluded, Y does not have to file two court applications (stay of execution) and the following benefit may be enjoyed:

(i) the court of first instance and appellate court will not be unduly burdened to hear and decide the two court applications (stay of execution). Limited judicial resources will then be better utilized to dispose of deserving cases; and

(ii) parties need not waste valuable time, expense and effort with regard to the two court applications (stay of execution).

[36] As explained in the above para 35, the parties' agreement (stay of execution of first order) was valid and bound both the appellant and respondent in this case.

K(2) Did parties agreement (stay of execution of first order) stay execution of first option in para 2?

[37] We have no hesitation to decide that the effect of the parties' agreement (stay of execution of first order) was to stay the appellant's enforcement of the first option in para 2. As explained in the above para 35, if there was no parties' agreement (stay of execution of first order), the appellant would have enforced the first option before the disposal of the respondent's appeal (first order) and this would then render nugatory the respondent's appeal (first order). In this regard, we cannot accept the contention by the respondent's learned counsel that the parties' agreement (stay of execution of first order) did not operate to stay the appellant's enforcement of the first option. In fact, the respondent's letter (15 May 2019) had applied to the appellant for 'a stay of all further proceedings' until the disposal of the respondent's appeal (first order). The respondent's letter (15 May 2019) did not apply for the appellant's consent to stay the execution of para 3 only. It is therefore disingenuous of the respondent to allege that the parties' agreement (stay of execution of first order) did not stay the enforcement of the first option by the appellant.

K(3) Could parties agreement (stay of execution of first order) be made after expiry of 14 days period (para 2)?

[38] We reproduce below O 45 r 6(1) of the ROC:

> O 45 r 6 *Judgment or order requiring act to be done: Order fixing time for doing it*
>
> (1) *Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein*. (Emphasis added.)

[39] Firstly, there is nothing in the ROC, including O 45 r 6(1) of the ROC, which requires parties' agreement (execution of judgment/order) to be made before the expiry of a time period which is stipulated in the judgment/order for the execution of the judgment/order ('time period (judgment/order)'). Secondly, we are also not aware of any case which has invalidated parties' agreement (execution of judgment/order) merely on the ground that the parties' agreement (execution of judgment/order) had been made after the lapse of the time period (judgment/order). Thirdly, notwithstanding the expiry of the time period (judgment/order), in accordance with the Doctrine of Freedom of Contract, parties to a judgment/order have the freedom to conclude parties' agreement (execution of judgment/order). Lastly, public policy considerations ('as discussed in the above sub-para 35(3)') support our decision that parties' agreement (execution of judgment/order) can be concluded after the lapse of the time period (judgment/order). If otherwise, our courts will be unnecessarily inundated with two court applications (stay of execution).

[40] In view of the reasons stated in the above para 39, the parties' agreement (stay of execution of first order) was valid notwithstanding the fact that the parties' agreement (stay of execution of first order) was concluded after the expiry of the 14 days period (para 2). Accordingly, the learned JC committed a clear error in law when His Lordship failed to give effect to the parties' agreement (stay of execution of first order) (second legal error).

K(4) Whether first option was unenforceable after lapse of 14 days period (para 2)

[41] Order 3 r 5(1) and (2) provide as follows:

> O 3 r 5(1) *The Court may, on such terms as it thinks just, by order extend* or abridge *the period within which a person is required or authorized* by these Rules or *by any judgment, order or direction, to do any act in any proceedings*.
>
> (2) *The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period*. (Emphasis added.)

[42] It is clear that reading together O 45 r 6(1), O 3 r 5(1) and (2) of the ROC, a party to a judgment/order can apply to court for an extension of the time period (judgment/order) after the expiry of the time period (judgment/order).

[43] The learned JC made a far-reaching decision, namely, the appellant's right to exercise the first option in para 2 'expired' after the lapse of 14 days period (para 2) and could not thereafter be invoked by the appellant. Firstly, as explained in the above paras 37, 39 and 40, the parties' agreement (stay of execution of first order) was valid notwithstanding the expiry of 14 days period (para 2). Consequently, the first option was preserved by the parties' agreement (stay of execution of first order). In this respect, the learned JC had committed an error of law by deciding that the first option was no longer enforceable by the appellant without considering the effect of the parties' agreement (stay of execution of first order) (third legal error).

[44] Even if there was no parties' agreement (stay of execution of first order), we wish to state that the appellant's right to exercise the first option in para 2 was not extinguished on the expiry of 14 days period (para 2). This was because notwithstanding the lapse of 14 days period (para 2), the appellant could still apply to court pursuant to O 45 r 6(1) read with O 3 r 5(1) and (2) of the ROC for the court to extend the 14 days period (para 2).

K(5) Whether parties agreement (stay of execution of first order) imposed reasonable time period for appellant's enforcement of first option

[45] Upon the delivery of the Court of Appeal's decision (first order) and as a consequence of the parties' agreement (stay of execution of first order), we are of the view that there should be a reasonable time period for the appellant to exercise the first option ('reasonable time period'). If there is no reasonable time period after the pronouncement of the Court of Appeal's decision (first order), this will render the first option redundant upon the expiry of 14 days period (para 2). Such an outcome is contrary to the interpretation of a judgment/order as elucidated in *Newacres* (the court shall, as far as possible, give effect to para 2).

[46] In this case, after the Court of Appeal's decision (first order) on 30 June 2022, the appellant had invoked the first option by way of the appellant's letter (22 July 2020) and Messrs BHTA's letter (23 July 2020). The appellant's exercise of the first option was within a reasonable time period after the Court of Appeal's decision (first order). The learned JC had committed an error of law by not deciding that by virtue of the parties' agreement (stay of execution of first order), the appellant had reasonable time to exercise the first option (fourth legal error).

K(6) Was respondent estopped by parties agreement (stay of execution of first order) from relying on expiry of 14 days period (para 2)?

[47] We accept the submission by the appellant's learned counsel that by reason of the parties' agreement (stay of execution of first order), the respondent was estopped in this case from exploiting unlawfully the lapse of the 14 days period (para 2). It is clearly unjust for the respondent to:

(1) have sought the appellant's consent to conclude the parties' agreement (stay of execution of first order) — please refer to the respondent's letter (15 May 2019);

(2) stay the enforcement of the first option ('pending the disposal of the respondent's appeal (first order)') by way of the parties' agreement (stay of execution of first order); and

(3) file the OS after the delivery of the Court of Appeal's decision (first order) and assert that the first option could no longer be exercised by the appellant after the 14 days period (para 2) had expired.

In our view, the learned JC's failure to apply in this case the wide doctrine of equitable estoppel, amounted to a legal error (fifth legal error).

L. WHETHER S 340(2)(C) OF THE NLC WAS RIGHTLY APPLIED BY LEARNED JC

[48] We reproduce below ss 340(1), (2)(c) and 417(1) of the NLC:

> s 340(1) *The title or interest of any person or body for the time being registered as proprietor of any land*, or in whose name any lease, charge or easement *is for the time being registered, shall, subject to the following provisions of this section, be indefeasible*.
>
> (2) *The title or interest of any such person or body shall not be indefeasible —*
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) *where registration was obtained by forgery, or by means of an insufficient or void instrument; or*
>
> (c) *where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law*.
>
> s 417 *General authority of the Court*
>
> (1) *The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith*. (Emphasis added.)

[49] Firstly, s 340(2)(c) of the NLC only applies to render defeasible titles and interest in land ('title/interest (land)') which have been registered 'in the purported exercise of any power or authority conferred by any written law'. The term 'written law' is not defined in s 5 of the NLC. Hence, we resort to the Interpretation Acts 1948 and 1967 ('the IA') as follows:

(1) Part I of the IA (which contains, among others, s 3 of the IA) applies to the NLC by virtue of s 2(1)(b) of the IA (because the NLC has been revised under the Revision of Laws Act 1968); and

(2) according to s 3 of the IA:

(3) *'written law' means*:

(a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

(b) Acts of Parliament and subsidiary legislation made thereunder;

(c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder;

(d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary

legislation made thereunder) which are in force in Malaysia or any part thereof. (Emphasis added.)

[50] Even if it is assumed that the registered transfer (respondent's share) was acquired contrary to para 2:

(1) the learned JC had erroneously applied s 340(2)(c) of the NLC to set aside the registered transfer (respondent's share). This is because s 340(2)(c) of the NLC can only be applied to set aside title/interest (land) which has been registered in the purported exercise of any power or authority conferred by 'written law' as defined in s 3 of the IA. In this case, the registered transfer (respondent's share) was effected pursuant to para 2 of the first order and was not done under any written law; and

(2) the registered transfer (respondent's share) can only be set aside by the court pursuant to s 417(1) of the NLC ('court or a judge may by order direct the registrar or any land administrator to do all such things as may be necessary to give effect to' the first order).

At the risk of repetition, as explained above, we reiterate that the registered transfer (respondent's share) was effected in accordance with (and not contrary to) para 2.

M. WAS SECOND COURT'S ORDER (SALE TO THIRD PARTIES) ENFORCEABLE AGAINST THIRD PARTIES?

[51] In the following two decisions, our apex court has decided that a judgment/order does not bind a party if the party has been deprived of his or her right to be heard before the judgment/order is made:

(1) the judgment of Mohd Azmi SCJ in the Supreme Court case of *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303, at p 306; and

(2) Edgar Joseph Jr FCJ's decision in the Federal Court in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, at p 381–383.

[52] With respect to the learned JC, the second court's order (sale to third parties) could not bind the third parties because:

(1) the third parties were not cited by the respondent as co-defendants in the OS; and

(2) the third parties were not heard by the second court before the making of the second court's order (sale to third parties).

Based on the above reasons, the learned JC had erroneously made the second court's order (sale to third parties) (sixth legal error).

N. OUTCOME OF APPEAL (OS)

[53] In view of the first to sixth legal errors, we are constrained to allow the appeal (OS) with the following order:

(1) the second court's decision (OS) is set aside; and

(2) subject to payment of allocatur fee, the respondent shall pay costs of a sum of RM20,000 to the appellant.

[54] This case sends a clear message that a party to a final judgment/order, should not be allowed to evade a positive obligation imposed by the judgment/order on spurious grounds regarding non-compliance with a time period stipulated in the judgment/order.

Order accordingly.

Reported by Ahmad Ismail